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IN THE

Supreme Court of the United States

October Term, 1962

NO. 415

BUCK C. MILLER, *Appellant*

versus

P. FRANK LAKE, SECRETARY OF STATE,
Appellee

APPEALED FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

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APPEALED FROM THE SUPREME COURT OF TEXAS

To: The Honorable Supreme Court of the United States of America:

Jurisdictional Statement

Appellant appeals from the final judgment of the Supreme Court of Texas in overruling the motion of Petitioner for leave to file Petition for Writ of Mandamus, Petitioner filed a Petition for Mandamus against P. Frank Lake, Secretary of the State of Texas, seeking to have the name of Buck C. Miller, placed and printed upon the official ballot to be prepared for and to be voted at

the General Election to be held in Harris County, Texas, on the 6th day of November, 1962, to become a non-partisan or independent candidate for Judge of the Probate Court of Harris County, Texas.

Opinions Below

The Supreme Court of The State of Texas refused the Petitioner the right to file the Petition for Mandamus.

The order of the Supreme Court of Texas, refusing Petitioner leave to file Petition for Mandamus was rendered on August 6, 1962, is appended here as Appendix "A".

The order of the Supreme Court of Texas, overruling Petitioner's Motion for Rehearing, rendered on August 20, 1962, is appended hereto as Appendix "B".

Jurisdiction

The Supreme Court of Texas is the highest Court of Texas in which a decision in this cause could be had. It being a mandamus proceeding against an officer of the Executive Department of the State, the Supreme Court is expressly given exclusive jurisdiction.

Vernon's Texas Constitution, Article 5, Section 3;
Vern. Ann. Tex. Civil Statutes, Vol. 3, Art. 1733;
28 Tex. Jur. Mandamus, p. 593.

Its order overruling Petitioner's Motion for Rehearing was entered August 20, 1962, 28 *U.S.C.*, Sec. 2101(c).

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by Title 28, *U.S.C.*, Sec. 1257 (2).

An attack is made upon a statute of Texas and the following cases sustain jurisdiction of the Supreme Court to review the judgment below by direct appeal:

Hamilton v. University of California, 293 U.S. 245, 257-258;
Williams v. Bruffy, 96 U.S. 176, 183;
Atchison, Topeka & S. F. R. Co. v. Public Utilities Comm., 346 U.S. 346, 348-9.

Notice of appeal to this Court was filed in the Supreme Court of Texas on August 27, 1962.

Statutes Involved

Article 13.50 Election Code, *Vernon's Texas Civil Statutes* Vol. 9, p. 323. Non-Partisan and Independent Candidates.

The name of a non-partisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the Secretary of State and delivered to him within thirty (30) days after the second primary election day as follows: if for a State office to be voted for throughout the State, one per cent (1%) of the entire vote of the State cast for Governor at the last preceding general election; if for a congressional, supreme judicial, senatorial, representative, flotorial or judicial district office, three per cent (3%) of the entire vote cast for Governor in any such district at the last preceding general election; provided, that the number of signatures need not exceed five hundred (500) for any congressional, senatorial or judicial office, nor for any other office that is not filled by all the voters of the State. No application to the

Secretary of State shall contain the name of more than one (1) candidate, and no citizen shall sign such application, unless he has paid his poll tax or received his certificate of exemption; provided, that, if the office is one to which two (2) or more persons are to be elected, his application may be for as many candidates as there are persons to be elected to that office; and provided, also that no person who has voted at a primary election shall sign an application in favor of any one for an office for which a nomination was made at such primary election. Acts 1951, 52nd Leg., p. 1097, ch. 492, Art. 227.

Article 13.51 Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, p. 324. Oath to Application.

To every citizen who signs such application, shall be administered the following oath, which shall be reduced to writing and attached to such application, viz.: "I know the contents of the foregoing application; I have participated in no primary election which has nominated a candidate for the office for which I (here insert the name) desire to be a candidate; I am a qualified voter at the next general election under the Constitution and laws in force, and have signed the above application of my own free will." One (1) certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 228.

Article 13.52 Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, p. 325, Must Consent to Run.

The Secretary of State shall, on receipt of the application which conforms to the above requirements, issue his instruction to the county clerks of this State, or of the district, as the case may require, directing that the name of the citizen, in whose favor the application is made,

shall be printed on the official ballot in the independent column under the title of the office for which he is a candidate; provided, that the citizen, in whose favor the application is made, shall first file his written consent with the Secretary of State to become a candidate, within thirty (30) days after primary election day. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 229.

Article 13.53. Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, p. 325.

Independent condidates for office at a county, city, or town election may have their names printed upon the official ballot on application to the County Judge, if for a county office, or to the mayor, if for a city or town office, such application being in the same form and subject to the same requirements herein prescribed for applications to be made to the Secretary of State in case of State or district independent nomination; provided, that in county elections it shall be necessary for nomination of independent candidates for the independent candidate to file a petition with the County Judge, signed by five per cent (5%) of the entire vote cast in such county at the last general election, endorsing such candidate for a particular county office. And provided further, in elections for a city or town office, it shall not be necessary that independent candidates be nominated, but anyone otherwise qualified may have his name printed upon the official ballot for a particular office by filing his sworn application with the Mayor at least thirty (30) days prior to the election day and by paying such filing fees as may be required by Statute or by charter provision. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 230.

The pertinent provisions of Art. 13.12 of the Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, Pocket part

p. 48, are: Any such request shall be filed with the State Chairman in the case of state-wide races, with the district chairman in the case of districts consisting of more than one (1) county, and with the county chairman in case of county and precinct officers; such request shall be filed not later than the first Monday in February preceding such primary, and shall be considered filed if sent to such chairman at his post office address by registered mail from any point in this State, provided, however, that in the event that there is no candidate for the nomination of any office due to the death of the one who had filed or for any other reason, applications may be filed not later than the first Monday in March preceding the primary.

The pertinent provisions of Art. 13.47a: Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, pocket part, p. 63. Sec. 3. As a condition precedent to having a candidate's name printed on the official ballot under Article 227 or Article 230 (Articles 13.50 and 13.53) of this Code, there must, in addition to the requirement of those two (2) Articles, be filed, with the person with whom the written application must, thereunder, be filed, an affidavit, duly acknowledged by the person desiring his name to be placed on the ballot stating his occupation, county of residence, post office address, age, and the office for which he intends to run. The affidavit must be filed at the same requests under Article 190 13.12 of this Code must be filed.

V.A.T.S. Election Code, Art. 1401. Definitions.

The word "candidate" shall mean any person who has announced to any other person or to the public that he is a candidate for the nomination for or the election to any office which the laws of this State require to be determined by an election. The words "county office" shall mean any office to be filled by the choice of the voters residing in

only one (1) county or less than one (1) county. The words "district office" shall mean any office to be filled by the choice of the voters residing in more than one (1) county. The words "state office" shall mean any office to be filled by the choice of voters of the entire State. The above classification of offices shall include all offices of the United States Government filled by elections.

Questions Presented For Review

(1) Is Art. 13.53, Election Code, *Vernon's Texas Civil Statutes*, Volume 9, which requires the nomination of an independent candidate for a county office to have the endorement of five (5%) of the voters who voted at the last General Election which in this case be an endorsement containing the names of more than 10,000 qualified voters void because of discriminatory legislation in violation of due process of law when tested by Art. 1, Section 3, of the *State Constitution of Texas* and the issue of due process of law, and equal protection of the law as guaranteed under the Fourteenth Amendment of the United States Constitution in that Art. 13.53 Election Code requires more of an independent candidate than Art. 13.50 Election Code, pertaining to district and state offices which provides that in no event shall more than 500 qualified endorsers ever be required for filling an office that is voted upon by less than all the voters of the State in order for an independent candidate or non-partisan candidate to get his name on the general ballot?

(2) Are the provisions of Article 13.47a of the Election Code relating to a non-partisan or independent candidate discriminatory in that such non-partisan or independent candidate must file his intention to run not later than

the 1st Monday in February, preceding the primary of candidates running for office in the primary of a political party, and that such provisions clearly deprive qualified voters, who have not voted in any primray of a political party from nominating a non-partisan or independent candidate for office at a General Election in that if no person files an affidavit as a non-partisan or independent candidate at the time required by Art. 13.47a and 13.12 of the Election Code, then the provisions of said Articles have effectively prohibited and deprived the qualified voters, who have not voted in a primary from nominating a non-partisan or independent candidate for office to be voted on at the next General Election?

Further the requirements of Articles 13.12 and 13.47a of the Election Code when construed in connection with Art. 13.50 and 13.53 of the Election Code, as they apply to a non-partisan or independent candidate, are discriminatory and place a greater burden on the non-partisan or independent candidate, than the requirements pertaining to a candidate who offers himself as a candidate for public office on a political party primary.

That such provisions pertaining to non-partisan or independent candidates are arbitrary, capricious, wilful and discriminatory, and are vague and indefinite and are in violation of Art. 1, Section 3, of the Constitution of Texas and the 14th Amendment to the Constitution of the United States.

(3) Can a State Court refuse to order a Petition for Mandamus to issue placing the petitioner's name on the ballot as an Independent candidate for Judge of the Probate Court of Harris County, Texas, due to the fact that the Petitioner voted in the Democratic primary on May 5, 1962, on the ground that the petitioner owes a moral

obligation to support the nominee of the Democratic Party in that since having voted in such primary it has become apparent that such nominee has failed in his duties as a Judge and has forfeited his rights to the moral support by the petitioner in that on June 20, 1962, the Grand Jury of Harris County, Texas, returned true bills of indictments against the nominee of the Democratic Party for Judge of the Probate Court of Harris County, Texas, charging and indicting him with the intent to defraud the heirs and distributees of estates in which he was Judge and for converting to his own use money belonging to the estates with a suit being filed against him charging him with official misconduct and incompetency of office for the conversion of money belonging to estates over which he presided as Judge of the Probate Court of Harris County, Texas, for which he has been suspended?

(4) Does due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Art. 1, Section 3, of the Constitution of Texas, require the State of Texas, when it has enacted legislation for independent or non-partisan candidates to run for public office require such law to be clear, definite, and not discriminatory in order that a person may seek to be elected to public office at an election conducted pursuant to legal authority?

(5) Does the fact that petitioner failed to file his notice of intent to run for office by the 1st Monday in Februare, 1962, as provided by Section 3 of Art. 13.47a of the Election Code prevent his name from being placed on the general ballot, when to have done so would have been a futile thing, in the event Article 13.47a should be held to be constitutional?

Statement of the Case

Buck C. Miller, Appellant, is an Attorney at Law licensed to practice law in Texas, and has complied with the provisions of the State Bar Act of Texas, and is a member of the bar in good standing.

That he is fully qualified to hold the office of Judge of the Probate Court of Harris County, Texas, if elected thereto, and is a candidate for such office.

Appellee, P. Frank Lake, Secretary of the State of Texas, is and at all times herein involved has been the Secretary of State of the State of Texas.

On July 2, 1962, there was delivered to the Appellee, as Secretary of State aforesaid, at the Secretary of State's Office in the Capitol Building in the City of Austin, Travis County, State of Texas, in full compliance with the Statute known as Articles 13.50 and 13.51 of *Vernon's Annotated Texas Election Code* as amended, the petitions and applications containing the names of more than seven hundred (700) qualified persons endorsing and nominating Buck C. Miller as an independent candidate for Judge of the Probate Court of Harris County, Texas, which were duly signed, sworn, and certified in full compliance with the Statute known as Art. 13.50 and 13.51 of said Election Code as amended.

On July 2, 1962, Appellant duly filed with said Secretary of State, at his said office, appellant's duly executed written consent to become a non-partisan or independent candidate for the office of Judge of the Probate Court of Harris County, Texas, in the General Election of November 6, 1962.

Appellant therefore, on and at all times after July 2, 1962, was, has been, and is absolutely entitled to have

Appellee, as said Secretary, certify appellant's name as the name of such candidate as required by the statute known as Art. 1.03 of said Election Code as amended, and to have Appellant's name printed as the name of such candidate on the Official Ballot of and for the General Election to be held in this State November 6, 1962. And on and at all times since July 2, 1962, it was, and has been, and is Appellee's absolute duty so to certify Appellant's name.

Although, the Secretary of State was requested on July 2, 1962, to instruct the County Clerk of Harris County, Texas, to have the name of Buck C. Miller printed in the independent column, under the title of Judge of the Probate Court of Harris County, Texas, on the official ballot at the next General Election to be held for that position on November 6, 1962. P. Frank Lake, Secretary of State, of the State of Texas, forwarded to Buck C. Miller, his letter, denying said application that the name of Buck C. Miller, of Harris County, Texas, be printed on the General Election Ballot as an independent candidate for Judge of the Probate Court of Harris County, Texas, and the said P. Frank Lake, has advised the said Buck C. Miller that his name will not be certified by his office to be placed on the ballot for the general election to be held on November 6; 1962, as an independent candidate or non-partisan candidate for the office of Judge of the Probate Court of Harris County, Texas.

The Secretary of State refusal to certify the appellant's name to be printed on the general ballot for Judge of the Probate Court of Harris County, Texas, was threefold:

(1) That the office of Probate Judge is a county office and that Appellant's application should have been filed with the County Judge of Harris County, Texas, under Art. 13.53 Election Code.

(2) That appellant had not met the requirements of Section 3 of Art. 1347a of the Election Code.

(3) That appellant voted at the primary election at which the Democratic Party nominee for office of Probate Judge of Harris County was selected.

Whereupon the appellant filed his petition for Writ of Mandamus to require the Secretary of State to issue his instructions to the County Clerk of Harris County, Texas, to have the name of Buck C. Miller, placed and printed upon the official ballot to be prepared for and to be voted at, the general election to be held in Harris County, Texas, on the 6th day of November, 1962, to become a non-partisan or independent candidate for Judge of the Probate Court of Harris County, Texas, in the Supreme Court of Texas.

The Supreme Court overruled the appellant's motion for leave to file the petition for mandamus and appellant's motion for rehearing was overruled both without a written opinion being filed.

Statement

V.A.T.S. Election Code, Articles 13.50, 13.53 and 14.01 were directly attacked, on their face as applied as being vague, ambiguous and discriminatory and in violation of Art. 1, Section 3 of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States. This question was raised in the appellant's trial pleadings (Petition For Mandamus, p. 9, 55).

V.A.T.S. Election Code, Articles 13.12 and 13.47a were directly attacked on their face as being arbitrary, capricious, wilful and discriminatory, and are vague and indefinite and are in violation of Art. 1, Section 3, of the Consti-

tution of Texas and the 14th Amendment to the Constitution of the United States. This question was raised on the appellant's trial pleadings (Petition For Mandamus, pp. 11-12).

The question whether Due Process of Law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. 1, Section 3 of the Constitution of Texas required the State of Texas, when it had enacted legislation for independent or non-partisan candidates to run for Public office required such law to be clear, definite, and not discriminatory in order that a person may seek to be elected to public office at an election conducted pursuant to legal authority was raised in the appellant's trial pleadings (Petition For Mandamus, p. 55).

The Questions Are Substantial

The questions raised on this appeal are substantial, important and are of great public interest.

In the case of *Brewster v. Massey*, 232 S.W. 2d 678, the Supreme Court of Texas discussed at length the case of *Love v. Wilcox*, 28 S.W. 2d 515 Supreme Court of Texas and said "No questions could arise of wider public interest or of graver importance to the state than those involving abridgment of rights of citizens to participate in government through the selection of those who may become public officials by means of party nominations." The Court further held in the *Wilcox* case that there was no other adequate remedy other than by petition for mandamus. The Supreme Court of Texas was urgently requested to write a written opinion discussing the same questions presented by this appeal, but refused. A person has a vested right to become a candidate for public office.

Reasons For Granting The Writ

The only reasons it is contended that Appellant could not have his name placed on the official ballot for such position are as follows:

First Point

(a) That the application should have been filed in the office of the County Judge of Harris County, Texas, instead of with Appellee, Secretary of State.

Appellant states that such contention should be rejected because the provisions of Articles 13.50, 13.53 and 14.01 of the Election Code are so confusing, vague, ambiguous, and discriminatory, especially in Harris County, Texas, in that the territorial jurisdiction of the Probate Court of Harris County, Texas, is equal to each and every District Court, Courts of Domestic Relations, and the Senatorial District of Harris County, Texas, and its territorial jurisdiction exceeds that of both Congressional Districts of Harris County, Texas; and under the plain provisions of Article 14.01, each and every District Court, Court of Domestic Relations, State Senatorial District and Congressional District is a "county office"; but that the judiciary of the State of Texas has held that such offices are "district offices" and require the nomination of an independent candidate therefore by only five hundred (500) qualified voters, whereas the provisions of Article 13.53 require the nomination of an independent candidate for a County office by qualified voters equal at least to five (5%) of the entire vote cast in the county at the last general election; that such requirements for an independent candidate for a county office in Harris County, Texas, is clearly discriminatory in that there were over 200,000 votes cast in

Harris County, Texas, at the last general election; and an independent candidate would be required to have more than 10,000 qualified voters to name him as a non-partisan or independent candidate. Further, such voters would have to be persons who did not vote in the Democratic Primary on May 5, 1962, and they would have to make an oath that they had not participated in any primary which had nominated a candidate for the office to which they desired to nominate the non-partisan or independent candidate.

Such discrimination is in violation of Article 1, Section 3 of the Constitution of Texas and of the 14th Amendment to the Constitution of the United States.

Appellant had over 700 signatures, which were far short from five (5%) that would be required under Art. 13.53 of the Election Code.

Appellant contends that this statute is void because of discriminatory legislation and will not stand the test of due process of law, in that it requires more of an independent candidate than Art. 13.50, Election Code, which provides that in no event shall more than 500 qualified endorsers ever be required for filling an office that is voted upon by less than all the voters of the State.

The Courts of Texas have already construed Art. 13.53, as requiring five (5%) of the voters who voted at the last General Election endorse an Independent Candidate in order that his name be placed on the ballot. *Dancy v. Hunt*, 294 S.W. 2d 159, Ref. N.R.E.; *Greenwood v. City of El Paso*, Tex. Civ. App., 186 S.W. 2d 1015; and Attorney General's Opinion No. V-1513, dated August 28, 1952. *Austin v. City of Alice*, 193 S.W. 2d 290.

Under due process of law both State and Federal Art. 13.53 Election Code must fall as a matter of law and the Supreme Court of Texas can write nothing into that

Art. to prevent its failing. In the case of *Gilmore v. Waples*, 188 S.W. 1037, the Supreme Court of Texas, said that a court can only observe a statute and enforce it; that it cannot apply omissions in laws. That a court will try to determine the intent of the legislature, but can write nothing into the law to cure defects or omissions. It would be a futile thing to require this appellant to comply with the terms of an unconstitutional statute, which falls and fails as a matter of law and as such, Appellant would have no duty to file his application to get on the ballot in the office of the County Judge. *City of Houston v. State*, 171 S.W. 2d 203; *Board of Trustees, Etc. v. Farrar*, 236 S.W. 2d 663, and would have no duty to file his intent to run for office as provided by 13.47a Election Code for the same reason.

Art. 13.53 Election Code failing as a matter of law the requirements of it would also fall and Appellant would have no duty to file his application nor notice of intent to run for office in the office of the County Judge of Harris County, Texas, as required by such Art., but could proceed under Art. 13.50 pertaining to independent candidates. The law will not require the doing of a futile thing. *Sterrett v. Morgan*, 294 S.W. 2d 201. Due process of law requires the State of Texas to provide a law that is not discriminatory that will permit an independent candidate to have his name placed on the official ballot, and this Appellant has met all the requirements of Articles 13.50, 13.51, and 13.52, of the Election Code, the only valid statute pertaining to independent candidates *Weatherly v. Fulgham*, Supreme Court of Texas, 271 S.W. 2d 938.

Article 13.53 of the Election Code is vague, uncertain, indefinite and discriminatory and a person attempting to qualify as an independent candidate for office thereunder

is unable to do so and is deprived of the right to seek to be elected to public office at an election conducted pursuant to legal authority. *Sterrett v. Morgan*, 294 S.W. 2d 201. A person has a legal right to try and seek public office and the law should provide a clear definite understandable manner that is not discriminatory. A failure by the State of Texas to so provide denies a person of Due Process of Law, so as to render unconstitutional the Articles of the Election Code pertaining to independent candidates under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 3 of the Constitution of Texas. *Vernon's Texas Constitution*, Volume 1.

Clearly the legislature has discriminated against an independent candidate required to proceed under Article 13.53 of the Election Code.

Further in some cases an independent candidate in some District offices would have several counties to get the five hundred votes while under 13.53 the Election Code an independent candidate would be able to get the endorsement of voters from only one county. Here again the legislature has discriminated against the independent candidate who must meet the requirements of Article 13.53 of the Election Code. 12 *Tex. Jur. 2nd, Constitutional Law*, Section 101, Page 450, Equal Protection Under The Law; Discriminatory Legislation.

In the case of *Rucker v. State*, 342 S.W. 2d 325, the court said, (2, 5) "Article 1, Section 3, of the *Constitution of Texas, Vernon's Ann. St.*, and the *14th Amendment to the Constitution of the United States* secure all persons similarly circumstanced equal protection under the laws of this State or any subdivision thereof. . . .

Unequal treatment of persons under a state law which is founded upon unreasonable and unsubstantial classification constitutes discriminatory state action and violates both the state and federal constitutions.

The Appellant in the Petition for Mandamus set up all of the statutes and Articles of the Constitution of Texas, creating the different Courts of Harris County.

One of the reasons for discussing the different Courts of Harris County is to show that all of such courts whether District Courts or County Courts are Judicial Courts performing approximately the same function and covering the same territory and no substantial reason exists for the Legislature requirements of the number of persons needed to endorse an independent candidate for public office.

In Harris County the District Courts have jurisdiction only in Harris County, Texas, as do our five (5) Criminal District Courts and our three Courts of Domestic Relations. Clearly none of these courts operate in as many as two (2) counties, but under the definition of Art. 14.01 of the Election Code all of such courts would be classified as being a "county office", in that to be a "district office", under the Code such office must be filled by the choice of the voters residing in more than one (1) county. See definitions Art. 14.01, Election Code.

Nothing can be determined from the kind of court set forth in Article 13.50 of the Election Code because the kind of office according to the code is not determined by the kind of court but is determined by the manner in which the office is filled by the voters of the county. These Articles are in conflict with each other, confusing, misleading and make it impossible for an independent candidate to comply with the Election Code. Will the provisions of Article 13.50 of the Election Code providing in that

in no event will more than five hundred (500) signatures ever be necessary for any office that is not filled by all the voters of the State, be read into Article 13.53 of the Election Code? The case of *Greenwood v. City of El Paso*, supra, stipulated it into the case and the case of *Dancy v. Hunt* and the Attorney General Opinion supra did not read it into the case. We cannot determine the intention of the legislature and the cases are inconsistent.

Not withstanding the definition set out in Art. 14.01 of the Election Code we find the case of *Williams v. Huntress*, 272 S.W. 2d 87, the Supreme Court of Texas has added to the confusion of how to proceed under the Election Code by holding "Mr. Spears contends that in Art. 14.01 a county office is defined as an office elected by the voters of one county only. Since this court is for a one-county district, he contends it is a county office. In the recent case of *Carpenter v. Longuemare*, Tex. Sup., 270 S.W. 2d 457, this court held (the writer dissenting) that the definitions contained in Art. 14.01 were not controlling of all portions of the Code. It is settled that a one-county District Court is a district office in spite of the definition now contained in Art. 14.01, Election Code, V.A.T.S. *Hamilton v. Monroe*, Tex. Civ. App., Waco, 1926, 287 S.W. 304, affirmed 116 Tex. 153, 287 S.W. 306; *Bounds v. McCallum*, 122 Tex. 416, 52 S.W. 2d 1047. Consequently, we now hold that a special one-county District Court is a district office. . . .

Second Point

(b) Article 13.47a, Section 3, attempts to make it a condition precedent to having a non-partisan or independent candidate's name printed on the official ballot under Articles 13.50 and 13.53 of the Election Code, in addition

to the requirements of those two said Articles, that there be filed with the person with whom the written application must be filed an affidavit, duly acknowledged by the person desiring his name to be placed on the ballot as a non-partisan or independent candidate, his occupation, county of residence, post office address, age, and the office for which he intends to run, and that said affidavit be filed at the same time the request under Article 13.12 of the Election Code must be filed.

Appellant states that the provisions of Article 13.47a of the Election Code relating to non-partisan or independent candidate are clearly discriminatory in that such non-partisan or independent candidate must file his intention to run not later than the 1st Monday in February, preceding the primary of candidates running for office in the primary of a political party, and that such provisions clearly deprive qualified voters, who have not voted in any primary of a political party from nominating a non-partisan or independent candidate for office at a General Election, in that if no person files an affidavit as a non-partisan or independent candidate at the time required by Article 13.47 and 13.12 of the Election Code, then the provisions of said Articles have effectively prohibited and deprived the qualified voters, who have not voted in a primary, from nominating a non-partisan or independent candidate for office to be voted on at the next General Election.

Further the requirements of Articles 13.12 and 13.47 of the Election Code when construed in connection with Article 13.50 and 13.53 of the Election Code, as they apply to a non-partisan or independent candidate, are discriminatory and place a greater burden on the non-partisan or independent candidate, than the requirements pertaining to a candidate who offers himself as a candidate for public office on a political party primary.

That such provisions pertaining to non-partisan or independent candidates are arbitrary, capricious, wilful and discriminatory, and are vague and indefinite and are in violation of Article 1, Section 3, of the *Constitution of Texas* and the 14th Amendment to the *Constitution of the United States.*

Now under Articles 13.50 and 13.51 of the Election Code the people had a right to nominate an independent candidate for office and the candidate could if he desire to accept the nomination do so by complying with Art. 13.52 of the Election Code by consenting to run.

The Legislature has deprived the people of a constitution right to nominate such independent candidate for public office by taking away their right to nominate in that the Legislature has now limited the right to have one's name placed on the ballot as an independent candidate only if the candidate makes the affidavit provided for by Articles 13.47a and 13.12. Further Articles 13.47a and 13.12 discriminate against the independent candidate in that he is required to do more than the candidates of other parties as he is also required to consent to run as required by Article 13.52 of the Election Code, after being nominated.

The Supreme Court of Texas, has held that in *Westerman v. Mims*, 227 S.W. 178, that the people have a fundamental right to nominate an independent candidate for office. Art. 13.47a, which requires an independent candidate to file his affidavit of intent to run for office by the first Monday in February, is thus unconstitutional in depriving the people of the right to nominate an independent candidate for office.

If this Court should hold that Art. 13.47a is constitutional and even though it is admitted that appellant did not file his intent to run by the 1st Monday in February,

1962, due process of law, nevertheless, would require that this appellant's name be placed on the ballot, because had he complied with Art. 13.47a; Art. 13.53 of the Election Code fails as a matter of law as do the requirements to file the application and also the notice of intent to run for office with the County Judge and it would have been impossible for this Appellant to have complied with such statute and have his name placed on the ballot, and the law will not require the doing of a futile thing. *Sterrett v. Morgan*, 294 S.W. 2d 201. The federal rule consistently recognizes that the law and equity never require a vain act. *School Board of City of Charlottesville v. Allen*, 240 F. 2d 59, 63, 64 (4th Cir. 1956); *Gibson v. Board of Public Instruction*, 246 F. 2d 913, 914 (5th Cir. 1957).

Further due to the definitions of the Election Code Article 1 1 defining county offices and district offices the legislature has created confusion and make it impossible for an independent candidate to know whether he should file his application with the County Judge or with the Secretary of State.

The court should hold that my failure to comply with Articles 13.12 and 13.47a should not prevent the Secretary of State from being required to certify my name to the County Clerk of Harris County, Texas.

It is apparent that I could not have complied with the Election Code due to its misguiding, misleading, confusing and discriminatory requirements.

The Supreme Court of the United States in the case of *Baker v. Carr*, 82 S. Ct. 691 (1962) held that the Plaintiffs and others similarly situated were denied the equal protection of the law accorded them by the Fourteenth Amendment of the Constitution of the United States by virtue of the debasement of their votes.

Further the legislature has discriminated against the independent candidate as provided by Article 6.04 of the Election Code pertaining to death or declination in which the name of a new nominee may be provided by permitting the proper committee of the party to name a nominee to the position being sought without the nominee having to file his affidavit and request to go on the ballot as provided by Articles 13.12 and 13.47a of the Election Code. This is not permitted on behalf of an independent candidate or persons attempting to place the name of an independent candidate on the official ballot.

The case of *Gilmore v. Waples, Supreme Court*, 188 S.W. 1037, is authority that the people's right to run candidates for public office must not be unreasonably interfered with by the legislature, the court saying, "it is the undoubted right of a political party to make nominations for the elective officers of the people. The legislature has the authority to prescribe reasonable methods to be employed for the purpose; but it does not possess the power to absolutely prohibit any nomination being made. Such an attempt would constitute an arbitrary interference with the liberty of the people to freely associate themselves for the purpose of expressing such choice for their elective offices as they might select and for reasons they might see fit. "The liberty of the electors in the exercise of the right vested in them by the Constitution to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality, and are therefore criminal, cannot be denied. It seems to me as absolute as the right to pursue any trade or calling, and therefore their right to associate and organize for that purpose is equally great." *Coffey v. Democratic General Committee*, 164 N.Y. 335, 58 N.E. 124, 51 L.R.A. 680.

The legislature has taken away from the people their right to run independent candidates for office by its enactment of Articles 13.47a and 13.12 permitting only a person who files the affidavit required to have his name placed on the ballot. Under Article 13.50, 13.53 Election Code no such requirement is made and the people have a vested right to nominate an independent candidate and if he consents to run as provided by Article 13.52 of the Code his name should be placed on the ballot.

Third Point

(c) It is admitted that Buck C. Miller voted in the Democratic Primary on May 5, 1962, and in the Second Primary on June 2, 1962, in which Judge Clem McClelland was nominee of the Democratic Party for Judge of the Probate Court of Harris County, Texas. At that time nothing was known by the public or appellant about the misconduct of the said Clem McClelland; all of such misconduct having become apparent since June 2, 1962. Does the said Buck C. Miller still owe a moral obligation to support Clem McClelland the nominee of the Democratic Party? Appellant would show that he is no longer morally obligated to support Clem McClelland, the nominee of the Democratic Party for Judge of the Probate Court of Harris County, Texas, due to the fact that appellant voted in the Democratic Primary on May 5, 1962, in that since having voted in such primary it has become apparent that Clem McClelland has failed in his duties as a Judge and has forfeited his right to the moral support of the said appellant by having had a suit filed against him in cause number 596,784, In The 61st Judicial District Court of Harris County, Texas. In such petition it is alleged that on June 20, 1962, the Grand Jury of Harris County, Texas, re-

turned true bills of indictments against the said Clem McClelland charging and indicting him along with others as principals with the intent to defraud the heirs and distributees interest in the estates under the control of Clem McClelland and for converting to their own use money belonging to the estates.

The suit filed against him in cause number 596,784, is based on these indictments and charge him with "Official Misconduct" under Article V, Section 24 of the *Constitution of Texas* and as that term is defined under Article 5973 *V. A. C. S.* He is also charged with "incompetency" under Article V, Section 24 of the *Constitution of Texas*, and as that term is defined by Article 5972, *V. A. C. S.*

The cases have based the refusal to issue the mandamus on the ground that the appellant did owe a moral obligation to support the nominee of the party in which primary he had voted, and thus did not come into court with clean hands. *Westerman v. Mims*, 227 S.W. 178, Supreme Court of Texas, said:

> "We do not say that circumstances might not arise under which one who had participated in a primary would be relieved of the moral obligation which is ordinarily incurred not to undertake the nominee's defeat."

Just cause was alleged and proved by appellant (Petition for Mandamus, pp. 12-14, 63-65, 70-73) as a matter of law that appellant is no longer morally obligated not to undertake the defeat of the Democratic Party Nominee, Clem McClelland, for Judge of the Probate Court of Harris County, Texas, due to the fact that said appellant did vote in the Democratic Party Primary on May 5, 1962, and in the Second Democratic Primary runoff by voting on June 2, 1962.

Several courts in Texas have held that the right to run for public office is a judicial question and not a political one. *Sterrett v. Morgan*, 294 S.W. 2d 201. *Gilmore v. Waples*, 188 S.W. 1037, Supreme Court. The Appellant has no other remedy at law and will suffer great and irreparable injury unless Appellee is compelled to perform his ministerial duties. This is the remedy provided by the law of Texas for Appellant and if the law gives a person a right it must also provide an adequate remedy to enforce his right.

We find the cases holding that a plain ministerial duty to perform must be alleged and proved before a Petition for Mandamus will lie. However, such language does not mean that merely because a great and difficult task is involved that would require an exhaustive effort to determine if the duty to perform is owed that the Petition for Mandamus will be refused. It is true that Appellant is confronted by serious legal questions some involving the constitutionality of statutes.

Such questions do not permit the Supreme Court of Texas the right not to determine the constitutionality of such questions, merely because they are extremely difficult, for the Supreme Court of Texas, has held that the Appellant may in a proper case, attack the constitutionality of the statute by way of Petition for Mandamus. See *Metropolitan Life Insurance Company v. Love*, 101 Tex. 444, 108 S.W. 821, 1157 (wherein the court said that it might be that the Relator would be entitled to mandamus in such circumstances); and *Jones v. McMahan*, 30 Tex. 719 (wherein the validity of a statute relied on by the Respondent was attacked, and it was held to be unconstitutional).

See *Holman v. Pabst*, (Civ. App.) 27 S.W. 2d 340, holding that in proceedings to compel the calling of an election to determine whether or not live stock should be permitted to run at large, members of the commissioner's court had the right to question the constitutionality of the statute providing for such elections. See also, 28 *Tex. Juris., Mandamus*, Section 20, Questioning Constitutionality of Statutes, Page 549.

The only reasons why the Appellant's name should not be placed on the ballot are technical reasons that will and must fall when tested by Art. 1, Section 3, of the State Constitution and the issue of due process of law, and equal protection of the law as guaranteed under the Fourteenth Amendment to the United States Constitution.

Due process of law is involved in this case and will not permit some technical reason from preventing justice to prevail.

Conclusion

Wherefore, appellant prays that, after due notice and hearing, he be granted by this Court a peremptory mandamus order, or writ of mandamus, commanding appellee, as Secretary of State, to forthwith certify, as required by Article 1.03 of said Election Code, as amended, the name of Buck C. Miller, of Harris County, Texas, to be printed on the Official Ballot for the General Election of November 6, 1962, in the column for independent candidates, as the name of a candidate for the office of Probate Judge of Harris County, Texas, and it issue such instructions to the Supreme Court of Texas, to carry out its order.

That Appellant prays this Honorable Court to advance this cause out of its regular order and set the same down for a hearing at the earliest possible date in order that the

same may be heard and determined, and if the relief prayed for is granted, in time to have the name of Buck C. Miller printed on the official ballot in Houston, Harris County, Texas, in time for the election to be held on November 6, 1962. Time is of the essence in that absentee voting will commence twenty (20) days prior to that date, after which time the questions presented by Appellant will be moot. That it be ordered that no motion for rehearing will be entertained herein; and that Appellant have any and all relief proper in the premises, and judgment for costs herein.

Respectfully submitted,

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I, John J. Herrera, attorney for Appellant, hereby certify that on the 29th day of August, 1962, I served a copy of this brief on P. Frank Lake, Secretary of State of the State of Texas, Capitol Station, Austin 11, Texas, and to his attorney Will Wilson, Attorney General of Texas, Capitol Station, Austin 11, Texas, by mailing copies in duly addressed envelopes, with first class postage prepaid, at their respective addresses.

JOHN J. HERRERA
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Houston 2, Texas

APPENDIX "A"

No. A-9159 — August 6, 1962

BUCK C. MILLER, Relator
vs.
P. FRANK LAKE,
SECRETARY OF STATE,
Respondent

IN THE
SUPREME COURT
OF TEXAS

In the case of Miller v. Lake, Secretary of State, No. A-9159, motion for leave to file petition for writ of mandamus was this day overruled.

APPENDIX "B"

No. A-9159 — August 20, 1962

BUCK C. MILLER, Relator
vs.
P. FRANK LAKE,
SECRETARY OF STATE,
Respondent

IN THE
SUPREME COURT
OF TEXAS

Rehearing in the case of Buck C. Miller v. P. Frank Lake, Secretary of State, No. A-9159, was this day overruled.